IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1219 OF 2002

Shabbir Mohammed Hussain Shaikh @ Matin,
r/o.23-G, R.No.7, First Floor,
Memonwada Road, Murgi Mohalla,
Dongri, Mumbai - 400 003. ...Appellant
(At present Appellant is in (Ori.Accd.No.3)
Judicial custody).

Versus

The State of Maharashtra ...Respondent

AND

CRIMINAL APPEAL NO.1220 OF 2002

Javed Mohammed Ommer Patani @ Khalid,
r/o.136/138, R.No.56, Third Floor,
Kashmiri Building, First Chinch
Bunder Road, Dongri,
Mumbai - 400 003. ...Appellant/
(At present Appellant is in (Ori.Accd.No.4)
Judicial Custody).

Versus

The State of Maharashtra ...Respondent

AND

CRIMINAL APPEAL NO.1221 OF 2002

Mohammed Yusuf Hassan Shaikh
@ Tarbez @ Yusuf Takla,
1, Tandel Street Cross Lane,
R.No.20, 2nd Floor, Dongri,
Mumbai - 400 009. ...Appellant/
(At present Appellant is in (Ori.Accd.No.5)
Judicial Custody)

Versus

The State of Maharashtra ...Respondent

Mr.Girish Kulkarni with Mr.Kafil Khan for
Appellants in Cri.Appeal Nos.1219/02 & 1221/02.

Mr.Dipam D.Kathrani i/b Mr.Indrajeet Joshi
for Appellant in Cri.Appeal No.1220/02.

Mr.V.B.Konde-Deshmukh, A.P.P. for Respondent
in all the Appeals.

.....

CORAM: A.M.KHANWILKAR, J.

AUGUST 25, 2006.

ORAL JUDGMENT :

1. These Appeals can be disposed of by common Judgment, as all these Appeals arise out of same criminal case being M.C.O.C. Special Case No.9 of 2001 decided by the Court of Special Court constituted under Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred to as 'MCOCA') at Greater Mumbai. These Appeals are filed by accused Nos.3 to 5 respectively, questioning the correctness of the Judgment and Order passed by the Special Judge under MCOCA, Greater Mumbai dated July 22, 2002 in M.C.O.C. Special Case No.9 of 2001.

2. The Appellants were charge-sheeted and tried for offence punishable under Sections 120-B of the Indian Penal Code (hereinafter referred to as 'IPC'), 3(1)(ii) and 3(2) of MCOCA read with Section 307 of the IPC, further read with Section 120-B of the IPC and Section 353 read with Section 34 of the IPC. The accused Nos.1 and 2 who were the Police Officers named in the commission of the crime were additionally charged with offence under Section 222 read with Section 120-B of the IPC and also under Section 225 read with Section 34 of the IPC. It is not necessary to advert to the factual matrix of the case in extenso, as the issue involved in these Appeals can be answered by straightaway referring to the charge as framed against the accused persons by the Trial Court, which reads thus:

> "I, A.P.Bhangale, Special Judge under the M.C.O.C. Act, 1999 do hereby charge you:
>
> 1. Himmatrao Bhimrao Adhav
> 2. Prakash Dattaram Mistry
> 3. Shabbir Mohammed Hussain Shaikh @ Matin
> 4. Javed Mohammed Ommer Patni @ Khalid
> 5. Mohammed Yusuf Hussan Shaikh @ Tarbez @ Yusuf Takla

as follows :

FIRSTLY: That you abovenamed accused nos.1 to 5 on or about 31.3.2001 at about 13.30 hours or about in the premises of Metropolitan Magistrate Court No.6 and 46 at Mazgaon, Mumbai had agreed to do an illegal act or caused to be done an illegal act i.e. to cause escape of the undertrial prisoner Imran Nazir Shaikh from lawful custody while he was brought to Metropolitan Magistrate's Court for court work. You had in pursuance of the said criminal conspiracy caused escape of the said undertrial prisoner Imran Nazir Shaikh from the lawful custody (while undertrial prisoner was in judicial custody) and you have thereby committed an offence punishable under section 120-B of the I.P.C.

SECONDLY : On the aforesaid date, time and place knowing beforehand that the said Imran Nazir Shaikh is a gangster affiliated to the gang of Yunus Builder which is affiliated to the organised crime syndicate of Izaz Pathan operating from beyond the borders of India through his henchmen and gang members, you no.1 to 5 have aided and abetted each other to cause escape of undertrial prisoner Imran Nazir Shaikh from lawful custody and thereby you have committed an offence punishable under section 3(1)(ii) of the M.C.O.C. Act 1999,

THIRDLY: In pursuance of the criminal conspiracy as stated above, on the aforesaid date, time and place while you no.1 to 5 had aided and abetted each other in pursuance of your common object to cause escape of undertrial prisoner Imran Nazir Shaikh from the lawful custody you had attempted to commit murder of policemen in pursuance of the said conspiracy and thereby you have committed an offence punishable under section 307 of

the I.P.C. read with section 3(2) of the M.C.O.C. Act 1999 and also read with section 120-B of the I.P.C.

FOURTHLY : that you nos.1 and 2 on the aforesaid date, time and place were public servants viz. policemen doing duty legally bound as such public servant to prevent escape of undertrial prisoners and to apprehend or to keep in confinement the person in custody pursuant to the orders passed by the court, you both had intentionally omitted to apprehend the undertrial prisoner Imran Nazir Shaikh or intentionally suffered the said Imran Nazir Shaikh to escape from lawful custody and thereby you have committed an offence punishable under section 222 read with section 120-B of the I.P.C.

FIFTHLY : On the aforesaid date, time and place you nos.1 and 2 as public servants in pursuance of your common intention resisted to the lawful apprehension of the said Imran Nazir Shaikh and thereby you nos.1 and 2 have committed an offence punishable under section 225 read with section 34 of the I.P.C.

SIXTHLY : You nos.1 to 5 along with wanted accused on the aforesaid, date, time and place assaulted and used criminal force to the policemen, the public servants, who were acting in execution of their duties as public servants to prevent or deter the undertrial prisoner from escaping from lawful custody and thereby you have committed an offence punishable under section 353 read with section 120-B I.P.C. or in the alternative section 34 of the I.P.C.

And thereby you are all within cognizance of this Special Court and I hereby charge you and direct that all of you be tried by this Court aforesaid charges."

(emphasis supplied)

3. The Trial Court on analysing the evidence of the prosecution witnesses and the documentary evidence, passed the following order :

"Order

Accused nos.1 and 2 are hereby acquitted of all the offences with which they were charged. They shall be released forthwith if not required in any other pending criminal cases.

Accused nos.3 to 5 are convicted for the offence punishable under section 120-B I.P.C. and also under section 3(2) of the M.C.O.C. Act 1999 and each of them are hereby sentenced to suffer R.I. for seven years and to pay fine in the sum of Rs.5 lakhs each and in default of payment of fine to suffer further R.I. for one year by each of them.

However, they are acquitted of all other offences with which they were charged. -

Set off be allowed for the period of imprisonment already undergone as undertrial prisoner.

Article Nos.1 to 4 which according to prosecution were seized under panchanama from the Mazgaon court premises be preserved for a period of 3 years from the date of this order since the articles would be required in the event the proclaimed accused Imran Nazir Shaikh @ Imran Mehendi is brought to justice. Case against proclaimed accused Imran Nazir Shaikh @ Imran Mehendi be kept on dormant file and shall be revived as and when he

is brought to justice.

Accused nos.3 to 5 shall be called to collect certified copy of this judgement and order on 31st July 2002."

4. Before this Court, the Appellants/accused Nos.3 to 5 contend that there is absolutely no legal evidence to proceed against Appellants/accused Nos.3 to 5 for offence punishable under Section 3(1)(ii) and Section 3(2) of MCOCA. The argument is that there is no legal evidence to establish the crucial ingredient for constituting the said offence. It is submitted that it is well established position that mere acquaintance with the member of organised crime does not make the person liable for offence under Section 3 of the MCOCA. Something more is required to be established, namely, that the person facilitated the commission of offence with knowledge that he was facilitating the commission of organised crime or any act preparatory to organised crime and that he rendered assistance to another person who was member of the organised crime syndicate, in relation to commission of an organised crime. It is submitted that the

principle underlying exposition in Paragraphs 30 to 32 in the Judgment of Division Bench of this Court in the case of **Bharat Shantilal Shah vs. State of Maharashtra reported in 2003 All MR (Cri.) 1061,** would apply in the case on hand. It is argued that the evidence used against the Appellants/accused Nos.3 to 5, is essentially the confessional statement of accused No.5. However, in the confessional statement, there is no mention whatsoever that accused No.5 or for that matter, accused Nos. 3 and 4 were conscious of the fact that they were to indulge in facilitating the commission of an organised crime or any act preparatory to organised crime or for that matter they, in particular, accused No.5 was rendering any assistance to a person known to him as member of organised crime syndicate. Moreover, even the Investigating Officer in his evidence has not spoken about these facts. Counsel further submits that there is no other legal evidence which will be relevant to decide the point in issue adduced by the prosecution.

5. Learned A.P.P. appearing for the State

fairly accepts that for establishing offence under Section 3(1)(ii) and 3(2) of the MCOCA, the prosecution has relied mainly on the confessional statement of accused No.5 and the other circumstantial evidence to corroborate the said confession against accused Nos.3 and 4 to bring home the offence against the accused Nos. 3 and 4. Learned A.P.P. also accepts that the Investigating Officer has not spoken about the ingredient of knowledge attributable to accused No.5 which is the quintessence of proceeding against the person for offence under Section 3(1)(ii) or Section 3(2) of MCOCA. Learned A.P.P. fairly accepts that the Trial Court has proceeded on the assumption that the prosecution has established the said ingredient to constitute the offence under MCOCA.

6. Accordingly, the limited issue that arises for my consideration in these Appeals is: whether the prosecution has adduced any legal evidence to establish the fact that the accused Nos.3 to 5 knowingly or intentionally facilitated the commission of an organised crime or any act preparatory to organised crime or they, in

particular, the accused No.5 had knowledge and intention that he was to render assistance to a member of the organised crime syndicate. The prosecution case is that accused No.5 came in contact with Imran Nazir Shaikh @ Imran Mehendi while in jail. There is, however, no evidence either in confession of accused No.5 or spoken by the Investigating Officer or any other witness that accused No.5 had knowledge that the said Imran Mehendi was a member of any organised crime syndicate or for that matter, they (accused Nos.3 to 5) had intention to facilitate the commission of an organised crime or any act preparatory to organised crime or that they were intentionally rendering assistance to a person, who was incidentally member of the organised crime syndicate. The Court cannot assume the fact, which is one of the ingredient of the offence under Section 3 of the MCOCA. It is well established that every ingredient of the offence has to be established by the prosecution in evidence. Suffice it to observe that learned A.P.P. inspite of his best efforts, was not able to lay hand on any part of the evidence, which would indicate that

accused Nos.3 to 5 and accused No.5 in particular had knowledge beforehand that said Imran Nazir Shaikh @ Imran Mehendi is a gangster affiliated to the gang of Yunus Builder, who was affiliated to organised crime syndicate of Ejaz Pathan, operating from beyond the borders of India through his henchmen and gang member. Evidence on this is crucial ingredient of charge-Secondly to constitute offence under Section 3(1)(ii) of MCOCA, is totally lacking.

7. So far as charge-Thirdly is concerned, that can proceed against the accused Nos.3 to 5, only if the factum that accused Nos.3 to 5 and in particular, accused No.5 who has given confessional statement, had knowledge beforehand that Imran Nazir Shaikh @ Imran Mehendi was a gangster affiliated to the gang of Yunus Builder, who is affiliated to organised crime syndicate of Ejaz Pathan, who in turn, was to commit offence of organised crime. In other words, the Appellants/accused Nos.3 to 5 cannot be proceeded with charge-Secondly and Thirdly for offence punishable under Section 3(1)(ii) and 3(2) of

MCOCA.

8. The next question is: whether the Appellants would succeed in their Appeals in entirety. It is not possible to take that view. This is so because, the Appellants are not challenging the finding reached by the Court below on the factum of conspiracy hatched and executed for preventing the public servants or deterring them so as to enable the undertrial prisoner to escape from their lawful custody, thereby, committed offence under Section 120-B and Section 353 read with Section 120-B of the IPC. Indeed, the Trial Court has not specifically recorded order of conviction against the Appellants for offence under Section 120-B and Section 353 read with Section 120-B of the IPC. However, from the Judgement, which is impugned before this Court, from the discussion, it can be culled out that, that was the conclusion reached by the Trial court to record finding of guilt against the Appellants with reference to offence under Section 120-B and Section 353 read with Section 120-B of the IPC. Presumably, the Trial Court has not passed separate

order of sentence for the offence under Sections 120-B and 353 read with Section 120-B of the IPC in terms of charge-Firstly and Sixthly, as the maximum sentence that can be awarded for the said offences can extend only up to two years or with fine or with both. In the circumstances, even if the Appellants succeed in challenging the correctness of the order of conviction under Section 3(1)(ii) and 3(2) of the MCOCA, however, the Appellants will be still guilty for offences punishable under Section 120-B and Section 353 read with Section 120-B of the IPC. The Appellants have already undergone the maximum sentence that could be awarded for the offence under Section 120-B and Section 353 read with Section 120-B of the IPC.

9. Accordingly, I proceed to pass the following order in these Appeals:

> Appellants/Accused Nos.3 to 5 are convicted for the offence punishable under Section 120-B (charge Firstly) and Section 353 read with Section 120-B of the Indian Penal Code (charge Sixthly) and each of

them are sentenced to suffer rigorous imprisonment for two years for the respective offences and to pay a fine of Rs.25,000/- (Rupees Twenty-five Thousand) each. In default of payment of fine, to suffer further rigorous imprisonment of three months by each of them.

Substantive sentences for the respective offences to run concurrently.

The Appellants/accused Nos.3 to 5 are acquitted of offences under Section 3(1)(ii) and Section 3(2) of the Maharashtra Control of Organised Crime Act, 1999.

If the Appellants/accused Nos.3 to 5 have already undergone the sentence awarded hereinbefore, they shall be set at liberty forthwith, unless required in some other offence.

A.M.KHANWILKAR, J.